-HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No. 179 (MS) of 2004

Sheel Chand Jain
S/o Sh. Asha Ram Jain
And others. ..... Petitioner

Vs

Additional District Judge/
5th Fast Track Court, Dehradun
and others. ..... Respondents.

Counsel for the petitioners Sh. Ram Ji Srivastava
And Sh. J.K. Jain
Counsel for the respondent Sh. Alok Singh.

Dated: 23-9-2004

Hon'ble Rajesh Tandon J.

Heard Sh. Ram Ji Srivastava and Sh. J.K Jain learned counsel for the petitioner and Sh. Alok Singh learned Senior counsel for the respondent.

By the Present writ petition the petitioner has prayed for a writ of certiorari praying for the quashing of the order passed by the Additional District Judge/ 5th Fast Track Court Dehradun, respondent No.1 in small cause court revision no. 8 of 2002 Sheel Chand Jain and another Vs. Smt. Vimla Devi and others as well as the order dt. 27-11-2002 passed by the Civil Judge (Senior Division) 1st Fast Track Court Dehradun, respondent No. 2 in small cause court case No. 27 of 2000 Sheel Chand Jain and another Vs. Amt. Vimla Devi and others.

Factual Aspect Of the Case

Briefly stated the dispute relates to property known as 34 (Old No. 31) situate at Netaji Street Dehradun. Petitioners are the landlord

who purchased the same from Smt Rajeshwari Jain, wife of Sh. Sunil Kumar Jain vide registered sale deed dt. 30-11-1998, originally, mother of the respondent No.3 to 6, namely Smt. Vimla Devi was the tenant in of the property at the rent of Rs. 25.00 per month, since the time of earlier owner of the property.

As will appear from the plaint averments that till April 2000, the sum of Rs. 4,925/- was due against Smt Vimla Devi for which the notice was sent on 26.4.2000 along with the sum of Rs. 600 towards the cost of the notice and as such the demand of Rs. 5,925/- having being made by the petitioners from the defendant No.1 but inspite of the notice having being served on May 2000, the defendant No.1 has failed to pay the rent.

In paragraph 8 of the plaint defendant No. 1 in his reply notice dt. 22-5-2000 has denied the title of the plaintiff, and the later has not waived his right of re-entry or condoned the conduct of the tenant and therefore the respondents are liable to be evicted on that ground also. Petitioners have also submitted that the transfer deed dt. 30-11-1998 executed by Smt. Rajeshwari Jain wife of Sh. Sunil Kumar Jain by which she has executed her entire share in favour of the plaintiff and the said fact was informed to the defendant No.1 and treating the plaintiff as the landlord of the premise, the defendant No.1 by way of receipt dt. 5-12-1999 has paid a sum of Rs. 5,125/- towards the part of the rent. In April 2000, again the rent became due for the period of more than 4 months for which the notice was sent on 26-4-2000, which was duly served on the defendant No. 1 on 3-5-2000.

Counsel for the petitioners has submitted that the defendant no. 1 has also made substantial alteration in the building without the consent of the landlord and on this ground the defendant No.1 is liable to be evicted from the premises in dispute.

During the pendency of the suit Smt. Vimla Devi expired on 7-September 2000 and the plaintiff has substituted the heirs by way of amendment made in paragraph 16 Ka of the plaint.

Both the courts below have dismissed the suit. The present writ petition has been filed against the order passed by the courts below. In paragraphs 12 and 13 of the writ petition, the petitioners have disputed that the rent was deposited on the 1 st date of hearing in accordance with the provisions of Section 20(4) of the U.P. Act no.13 of 1972.

The petitioners have also stated that the cost of the suit has not been deposited by defendant/respondents, so as to get the benefit of U.P. Act No. 13 of 1972.

The respondents No. 3 to 6 are the heirs of Smt. Vimla Devi. The written statement was filed on 31-5-2001by Sh. Sanjay Singh one of the heir of Smt. Vimla Devi who has denied the averments contained in the plaint and has stated that no default has been committed by the defendant. In paragraph 3 of the written statement, the respondents have stated that they have complied with the provisions of Section 20 94) of the U.P. Act No. 13 of 1972and as such they are not liable to be evicted.

In paragraph 8 of the plaint, the plaintiffs have stated that the defendants has denied the title of the landlord and the landlord has not waived his right of re-entry and has not condoned the conduct of the tenant and a such the defendant respondents are liable to be evicted. The said plea of the landlord is contained in paragraphs 8 and 9 of the plaint the same are quoted below:-

'' यह कि प्रतिवादी सं0–1 ने अपने अधिवक्ता के माध्यम से जो उत्तर सूचना पत्र दिनांक 22.5.2000 भिजवाया है, उसमें प्रतिवादी सं0–1 ने वादीगण

के मकानदार के स्वत्व को अमान्य किया है और वादीगण ने ना तो पुन प्रवेष के अपने अधिकार का अधित्याग किया है और न प्रतिवादी सं.–1 के उक्त आचारण को क्षमा किया है और प्रतिवादी सं.–1 उक्त आधार पर भी काबिल बेदखली है।''

''यह कि यह उल्लेखनीय है कि श्रीमती राजेष्वरी जैन पत्नी श्री सुनील कुमार जैन ने विक्रय पत्र दिनांक 30.11.1998 की जिसकी रजिस्टी कार्यालय सब रजिस्टार देहरादून में बही नं0–1 की जिलद –498 के पृष्ठ 20 एडी0फा0बुक नं0– किी जिल्द 678 के पृष्ठ –1 से 24 में क्रामांक संख्या 4446 पर दिनांक 30.11.1998 पर हुई के द्वारा सम्पत्ति संख्या31/34 नेताजी मोहल्ला देहरादून में अपना कुल हक, हिस्सा,स्वत्व व भाग वादीगण को विक्रय कर दिया था औार वादीगण ही वादग्रस्त सम्पत्ति के तनहा मालिक व अधिकारी है। वादीगण द्वारा श्रीमती राजेष्वी जैन से उसका कुल अविभजित भाग क्रय करने के सम्बंध में प्रतिवादी सं0–1 को सूचित कर दिया गया था और प्रतिवादी सं0. –1 ने वादीगण के पक्ष में सम्पादित मूल विक्रय पत्र दिनांक 30.11.1998 का अवलोकन करने के उपरान्त ही बादीगण को नतहा वादग्रस्त सम्पत्ति का भवन स्वामी स्वीकार करते हुये बजरिये रसीद दिनांक 5.12.1999 मुबलिग 5,125–00 रूप्ये बकाया किराये की बाबत आंषिक अदायगीया की थी।''

In reply to paragraph 8 following averments have been made in the written statement, paragraph 8 and 9 of the written statement are quoted below:-

'' यह कि वाद पत्र की चरण संख्या –8 असत्य, अस्वीकार तथा अमान्य है। यह कहना असत्य है कि प्रतिवादीगणों ने वादी के स्वत्व से इंनकार किया हो। प्रतिवादी ने स्पष्टीकरण जिसको उसका अधिकार था। स्पष्टीकरण प्राप्त होने पर बिना किसी ष्षर्त के अभिकथन स्वीकार कर लियें हो। इस सन्दर्भ में वादीगणो के अभिकथन दोषपूर्ण है तथा पूर्ण नही है। इसी आधार पर वादीगणों का वाद खण्डित होने योग्य है।

यह कि वाद पत्र की चरण संख्या–10 ,अस्वीकार व अमान्य है। यह स्वीकार है कि वादीगण प्रश्नगत सम्पत्ति के मकानदार है।''

In reply to paragraph 8and 9 of the plaint, it has been stated by respondent as under:-

''यह कि वादी पत्र की चरण संख्या–8 के लेख के विपरीत प्रतिवादी सं0–1/2 के प्रतिवाद पत्र की चरण संख्या–8 का लेख गलत एवं अस्वीकार है। यह कहना गलत है कि प्रतिवादी ने कोई स्पष्टीकरण चाहा था। वास्तव में उत्तर सूचना– पत्र में किया गया कथन स्पष्टत प्रतिवादीगण द्वारा वादीगण के मकानदार के स्वत्व को अमान्य करना है और प्रतिवादी सं0–1/2 अपनी माता प्रतिवादी सं0–1 के द्वारा किये गये कथन से मुकरने का `अधिकार नही है और प्रतिवादी सं0–1 द्वारा किया गया उक्त कृत्य उसके वारिसान पर बन्धनकारी है और इस संबंध मं प्रतिवादी सं0–1/2 द्वारा किया गया कथन विबन्ध व उपमति अभिकथन दोषपूर्ण हो या वाद खण्डित होने योग्य हो। प्रतिवादी को आपत्तिया विधि व तथ्यों व स्वीकारोकित के विरूध होने के कारण निरस्त होने तथा वादी का वाद सव्यय डिक्री होने योग्य है।

यह कि वादी पत्र की चरण संख्या 9 के लेख के विपरीत प्रतिवीद सं0–1/2 के प्रतिवाद पत्र की चरण संख्या –9 का लेख गलत एवं अस्वीकार है।''

Applicability 0f Sub-Section (4) 0f Section 20 0f The Act.

So far as under Section 20 sub-clause (4) of the U.P. Act No.13 of 1972 is concerned, the plaintiff has denied that the defendant/respondents are entitled for the benefit of Section 20 sub clause 4 of the U.P. Act No.13 of 1972. Further in paragraph 13, the

petitioners have stated that since the defendant/respondent have already constructed the house at premises No. 103/42 Darshni Gate Deharadun and 77/1, Nalapani Road Dehrain as will as at Patel Nagar Saharanpur Road and such no benefit can be extended to the defendant/respondents under Section 20(4) of the U.P. Act No. 13 of 1972, the relevant paragraph 13 is quoted below:-

''यह कि प्रतिवादी सं0–1/2 के प्रतिवाद पत्र की चनण संख्या–20 को लेख गलत एवं अस्वीकार है यह कहना गलत है कि प्रतिवादी द्वारा धारा 20(4) का अनुपालन कर दिया हो। प्रतिवादी तथकथित जमा राषि का कोई लाभ पाने का अधिकारी नही है वैसे भी तथाकथित जमा धनराषि अपूर्ण व प्रथम सुनवाई की तिथि के बाद,बाद की सूझ के तौर पर जमा की गई है। यह भी गलत है कि प्रतिवादी वादग्रस्त सम्पत्ति के निश्पादन से मुक्ति पाने को अधिकारी हो। प्रंस्तुत मामले में प्रतिवादी सं0–1/2 उ0प्र0 अधिनियम –13 वर्ष 1972 कीधारा 20(4) का लाभ पाने का अधिकारी नही है। प्रतिवादी को अन्य स्थान 103/42 दर्षनी गेट, देहरादून व 77/1 नालापानी रोड देहरादून तथा पटेलनगर, सहारनपुर रोड पर आवासीय भवन उपलब्ध रहे है तथा है।''

In paragraph 16 of he writ petition, the petitioners have stated that by virtue of proviso of section 20 Sub-clause 4, the defendant/respondents are not entitled for the protection under the Act, as the defendant/respondents No. 3to 6 have acquired the building in the same city and this fact has also been admitted by the respondent No.5 i.e. Sh. Sanjay Singh in his statement, therefore they are not entitled to get the protection of the Act. Paragraphs 16 and 17 of the writ petition are quoted below:-

"That the petitioner took the ground in the suit that tenant-respondent No.s 3-6 have acquired he building in

the same city and this fact is also admitted by the respondent no.5 in his statement, therefore his objection is not liable to accept, but the learned trial court did not give any finding into this issue and illegally rejected the suit, filed on behalf of petitioners, for eviction. The learned revisional court has also continued illegality is not considering the same and as such the judgment and orders, passed by the courts below, are illegal and arbitrary.

"That the explanation (i) of Section 21(1) of the U.P. Act No. 13 of 1972 provides that where the tenant or any member of his family has built or has otherwise acquired in a vacant state in the same city, no objection by the tenant shall be entertained, but in the present case, the leaned trial court as well as revisional court has not considered the same and despite of admission of the tenant respondent No.3, not only entertained the objection tenant respondent No. 5, but also rejected the suit, filed on behalf of petitioners against the respondent No.s 3 to 6 for eviction. The explanation (i) of section 21(1) of the U.P. No. 13 of 1972 is being quoted below:-

Explanation:- In case of a residential building:-

(i) Where the tenant or an member of his family [{who has been normally residing with or is wholly dependant on him}] has built or has otherwise acquired in a vacant state or has got vacated after acquisition on a residential building in the same city, municipality, notified area or town area, no

objection by the tenant against an application under this sub-section shall be entertained.

***[Note:-** For the purpose of this clause a person shall be deemed to have otherwise acquired a building, if he is occupying a public building for residential purpose as a tenant , allottee or licensee.]*

The Counter Affidavit has been filed by the defendant/respondents and paragraphs 16 and 17 have not been replied. However it has been stated in paragraph 3 of the counter affidavit that the writ petition is not legally maintainable,

Paragraph 5 of the Counter affidavit is quoted below:-

"That LRS of Original defendant Smt. Vimla Devi were substituted vide order dt. 19-12-2000. First date of hearing was 27-2-2001 and prior to 27-2-2001 tenant have deposited entire amount in the Court on 2-2-2001 . In view of this benefit of Section 20(4) of the U.P. Act No. 13 of 1972 was rightly given to the defendants."

I have perused the record and in the statement of PW 1 Sh. Pradeep Jain, he has stated that the defendant/ respondents have constructed the house at 103/42 Darshani Gate Dehradun, 77/1 Nalapani Road Dehradun and the Sh. Sanjay was residing in the said premises as well Khurbara Mohalla Dehradun near Guru Ram Mahilla Inter College, the relevant statement in quoted below:-

''प्रतिवादी सं0–1 के 1/4 श्रीमती विमला देवी के पुत्रगण ही प्रतिवादीगण के 103/42 दर्षनी गेट देहरादून, 77!1 नलापानी रोड देहरादून संजय भी इसी मकान में रहता है बाकी खुडबुडा मोहल्ला में रहते है। गुरुराम

राय महिला इंटर कालेज के पास। विमला देवकी के पुत्रगण षादी के पहले से ही इसी मकान में रहते थे। विमलादेवी के किरायेदार रहते है उसके पुत्र नगर पालिका सीमा देहरादून के अन्दर अलग अलग मकानों में रहने लगें।''

Sanjay Singh was examined as DW1 who has admitted that my elder brother Sh. Surender reside at Darshani Gate Dehradun and the other brother is residing at D.L. Road, the statement is quoted below:-

''मेरे सबसे बडे भाई सुरेन्द्र है यह दर्षनी गेट में रहते है मकान का नम्बर मुझे मालूम नही है। वह 10–15 साल से दर्षनी गेट में रह रहे हैं यह हलवाई का काम करते है। मेरे दूसरे भाई का नाम बिल्लू है सह डी0एल रोड पर रहते है 8–9 साल लगभग से डी0एल रोड पर रह रहे हैं तीसारा भाई में हूॅ चौथा मेरे छोटा है जो मेरे साथ रहता है।''

Learned Judge Small Cause Court has framed eight issues. Issue No. 1,4 and 5 was with regard tot he default and issue No. 7 was with regard tot the benefit of Section 20(4) of the U.P. Act No.13 of 1972. So far as issued No. 1to 7 are concerned a finding was recorded that the defendant/ respondent have already paid a sum of Rs. 8,500/- on 2-2-2001 and as such the respondents are entitled for the benefit of Section 20(4) of the U.P. Act No. 13 of 1972. The issues were decided against the plaintiffs, so far as issue No.4 is concerned, the Judge Small Cause Court has not considered the proviso to section 20(4) of the U.P. Act No. 13 of 1972 with regard to acquiring of the house in a vacant state any residential building in the same city inspite of the fact that the said averments remained unrebutted. The landlord has preferred the revision and the revisional court has dismissed the revision.

Revisional court has recorded a finding of Sh. Sanjay Singh DW 1 has stated that at that at the time of the death of his father, all the four brothers were residing along with his father and the two brothers have separated and have acquired other houses and one brother Sh. Surendra is residing at Darshani Gate Dehradun and the fourth brother is residing with Sanjay. The revisional court has recorded the finding that the proviso will not apply in the present case although after the death of the father of the respondents have acquired houses.

In the present writ petition only question of law which requires to be considered with regard to the effect of the proviso to section 20 (4) of the U.P. Act No. 13 of 1972. For ready reference Section 20(4) of the U.P. Act No. 13 of 1972, reads as under:-

> *" In any suit for eviction on the ground mentioned in clause (a) of sub-section (2) if at the first hearing of the suit the tenant unconditionally pays or [tenders to the landlord deposits in Court] the entire amount of rent and damages for sue and occupation of the building due form him(such damages for use and occupation being calculated at the same rate as rent) together with interest thereon at the rate of nine percent per annum and the landlord's cot of the suit in respect thereof, after deducting therefrom any amount already deposited by the tenant under sub-section (1) of Section 30, relieving the tenant against his liability for eviction on that ground.*
>
> *Provided that nothing in this sub-section shall apply in relation to a tenant who or any member of whose family has built or has otherwise acquired in a vacant state, or has got vacated after acquisition, any residential*

building in the same city, municipality , notified area or town area.

***[Explanation** – For the purpose of this sub-section-*

(a) The expression 'first hearing' means the first date for any step of counsel's mentioned in the summons served on the defendant:

(b) The expression 'cost of suit' includes one-half of the amount of counsel's fee taxable for a contested suit].

Admittedly, Sh, Kirat Singh was the tenant and after her death Smt. Vimla Devi his wife has acquired the tenancy rights she also died on 7-9-2000 leaving behind the heirs as respondents.

Relevant Law On The Question Of Joint Tenancy As Well As Acquisition By the Heirs Of The Deceased.

It is settled position of law that by virtue of the Joint tenancy, all the heirs of Smt. Vimla Devi shall constitute a single tenancy, which has dissolves on the heirs.

In H.C. Pandey Vs. G.C. Paul, the Apex Court in 1989 SC and Full Bench Rent Cases page 268 has held that the incidence of the tenancy is the same as those enjoyed by the original tenant. The relevant observations are quoted below:-

"The incidence of the tenancy are the same as those enjoyed by the original tenant. It is a single tenancy which devolves on the heirs. There is no division of the premises or of the rent payable therefore."

The aforesaid judgment has been followed in the case of Harish Tandon Vs. Additional District Magistrate, Allahabad, U.P. and others 1995 S.C. and Full Bench Rent Cases p 123, their lordship have followed the judgment of H.C. Pandey Vs. G.C. Paul has held as under:-

" It appears to us, in the case of H.C. Pandey Vs. G.C. Paul (supra) it was rightly said by this Court that after the death of the original tenant, subject to any provision to the contrary, the tenancy rights devolve on the heirs of the deceased tenants jointly. The incidence of the tenancy are the same as those enjoyed by the original tenant. It is a singly tenancy which devolves on the heirs and there is no division of the premises or of the rent payable therefore and the heirs succeed to the tenancy as joint tenants."

" In the case of Smt. Gian Devi Anand VS. Jeevan Kumar and others, 1985 SCFBRC 229 SC, the Constitution Bench of this Court in connection with Delhi Rent Control Act, 1958 said:

"The heirs of the deceased tenant in the absence of any provision in the Rent Act to the contrary will step into the position of the deceased tenant and all the rights and obligations of the deceased tenants including the protection afforded to the deceased tenant under the Act will devolve on the heirs of the deceased tenant. As the protection afforded by the Rent Act to a tenant after determination of the tenancy and to his heirs on the death of such tenant is a creation of the Act for the benefit of the tenant, it is open to the Legislature which provides for such protection to make appropriate provisions in the Act with regard to the nature and extent of the benefit and protection to be enjoyed and the manner in which the same is to be

enjoyed. If the Legislature makes any provision in the Act limiting or restricting the benefit and the nature of the protection to be enjoyed in a specified manner by any particular class of heirs of the deceased tenant on any condition laid down being fulfilled, the benefits of the protection has necessarily to be enjoyed on the fulfillment of the condition in the manner and to the extent stipulated in the Act."

The Apex Court in case of Harish Tandon (supra) has also interpreted sub clause (2) of section (12) is concerned. The definition of Section 3(a) shall not be interpreted differently as held in the case of H.C. Pandey case (Supra). The observations are quoted below: -

"As has already been pointed out that in the Act with which we are concerned, wherever the expression ' member of the family' has been used, it is consistent with the definition of 'family' given in Section 3 (g) and there is no scope for interpreting that expression in a different manner in connection with sub-section (2) of Section 12 of the Act. Once the finding of the High Court that after the death of sheobux Roy, his sons became tenants in common instead of joint tenants, is reversed for the reasons mentioned above, the result will be that it has to be held that because of the admission of Swarup Kailash, the in law of Ganpat Roy, as a partner in the business, there has been a deemed vacancy of the premises within the meaning of sub-sections (2) and (40 of Section 12 and it shall amount to sub-letting within the meaning of Section 25, Explanation (i), which is a ground for eviction under Sub-Section (2) (e) of Section 20 of the Act. The judgment in Mohd. Azeem's case, does not lay down the correct law and on the other hand we hold that H.C. pandeys case (supra) lays down the correct law."

In Ashok Chintaman Juker and others Vs. Kishore Pandurang Mantri and another AIR 2000 SC 2251, the Apex Court has followed the judgment of H.C. Pandey Vs. G.C. Paul AIR 1989 SC 1470 and has held as under:-

"This Court in the Case of H.C. Pandey Vs. G.C. Paul, AIR 1989 SC 1470 taking note of the settled position that on the death of the original tenant, subject to any provision of the contrary either negativing or limiting the succession, the tenancy rights devolve on the heirs of the deceased tenant, held that it is a single tenancy which devolves on the heirs. There is no division of the premises or of the rent payable thereafter and that is the position as between the landlord and the heirs of the deceased tenant. In other words, the heirs succeed to the tenancy as joint tenants. This Court further held that the respondents acted on behalf of the tenants; he paid rent on behalf of his father and he accepted notice on behalf of all; in the circumstances the notice served under Section 106 of the Transfer of Property Act on the respondent was sufficient and it was a valid notice."

"Therefore when the suit was filed in the year 1992 there was no necessity for the landlord to implead appellant No. 1 or members of his family in the suit since he (landlord) had no cause of action for seeking a decree of recovery of possession from them. In that view of the mater the decree under execution does not suffer from any illegality or infirmity. Viewed from any angle the appellants have not justification on the facts as well as in law to resist execution of the decree for possession of the premises by the landlord. The Executing Court rightly rejected the objection filed by the appellants against execution of the decree and the appellate court and the High Court

rightly confirmed the said order. This appeal being devoid of merit is dismissed with costs which costs is assessed at Rs. 10,000/-"

In Kesari Lal Vs. IIIrd Additional District Judge Meerut and others 1987 All. L.J. 922, the similar provision contained in the explanation to Section 21 like the proviso to Section 20 of the Act has been interfered and it has been held that on acquisition of two have the deemed vacancy shall be created. It reads as under:-

"The Explanation of Section 21(1) of the Act is quoted below:-

***"EXPLANATION:-** In the case of a residential building:-*

(i) Where the rent or any member of his family (who has been normally residing with or is wholly dependent on him) has built or his otherwise acquired in a vacant state or has got vacated after acquisition a residential building in the same city, municipality, notified area or town area, no objection by the tenant against an application under this sub-section shall be entertained.

"The word used in the Explanation "who has been normally residing with or is wholly dependent on him" has to be interpreted. In ' High School English Grimmer and Composition' by Wren and Martin, Hundred and Ninth Edition, at page 109 Art. 223, it has been laid down that the present Perfect Continuous Tense is used for an action which began at sometime in the past and is still continuing. The use of the expression by the Legislature " who has been normally residing" is a present perfect continuous Tense and as such the

submission of the member of the family must begin sometime in the past and should still continue when he acquires another building in a vacant state. There is no dispute in my opinion to his part of the submission made by the learned counsel for the petitioner. In order to make the Explanation applicable it is necessary that at the time when the member of the family acquired in a vacant state another residential building he should be a member who has been normally residing with the tenant."

"On a reading of the Explanation it does not say that the member of the family should also be residing on the date when the release application was filed. If such an interpretation is made it will make the Explanation absolutely nugatory and will defeat the very purpose of the Act. The intention of the Legislature in adding an Explanation to S.21 is to the effect that if a member of the family has been normally residing with the tenant and he has acquired a building in a vacant state he should not be permitted to object to the release application is filed he should also be in possession."

Similar provision of Section 20(4) of the Act came up for interpretation in Mohd. Illyas Ahmad Vs, 13th Additional District Judge, Allahabad and others 2002 (2) ARC 558, it has been held as under:-

"In the light of the above provisions, for the purpose of interpreting the words "member of the tenant's family" as used in the proviso to Section 20 (4), the definition in Section 3(g)

would be used by such use the son of the petitioner would be a member of the family of the petitioner, though the son may not be wholly dependent or normally residing with the tenant."

"Learned Counsel for the petitioner has relying upon (1) the decision of Supreme Court in the case of Harish Tandon Vs. ADM reported in 1995 (1) ARC 220, (2) the decision of a learned Single Judge of this Court in the case of Som Nath Seth VS. IInd ADJ reported in 1981 ARC 82, (3) the decision of the Division Bench of this Court in the Case of Sh. Nath Tandon Vs. RCEO reported in 1979 ARC 351, (4) the decision of a learned Single Judge of this Court in the case of Mohan Vs. IIIrd ADJ reported in 1995 (1) ARC 45, (5) the decision of S.C in the case of Mancheri Vs. Kuthipavattam reported in 1996(6) SCC 185, has submitted that under Section 20(4) the son would not be a member of family of the tenant unless the said son was wholly dependant upon the tenant or was normally residing with the tenant in the accommodation in dispute. The decision of Supreme Court in the case of (1996) 6 SCC 185 does not deal with the issue at all. The decision in 1995 (1) ARC 45 is also not on the point as it was a case where the spouse of the tenant had purchased a plot and not a house. All the remaining cases cited above deal with Explanation to Section 12 (3) of the Act. None of the cases deal with proviso to Section 20(4)."

"As will be noticed from the express words, Explanation (b) to Section 12(3) indicates that the modified definition of "member of family" is for the purposes of that sub-section only i.e. for the purpose of section 12 (3). There is no logical reasons to apply the modified definition to section 20(4) of the Act."

Counsel for the respondents have referred the judgment of Om Wati Gaur and others Vs. Jitendra Kumar and others AIR 2003 SC page 229, where he has referred the definition of the tenant which indicates that heir and legal representative residing at the time of his death of the tenant will be heirs only. The aforesaid proposition has no application in the present case in as much as once protection has been given to the tenant, the heirs of the tenant as held by the apex court constitute one single tenancy and therefore the single heirs have no right to defend individually. In view of the judgment of the Apex Court in H.C. Pandey (supra), which has been followed up to date, the orders passed by the courts below cannot be allowed to stand.

The argument of the counsel for the respondent Sh. Alok Singh therefore in connection with the definition of the 3(a) is not relevant in the present case in view of the observations made above.

Further in Harish Tandon (supra) it has been held that the role of the provision in statue creates legal fiction that something has to be done in a manner provided under the statue:-

"When a Statue creates a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, the Court has to examine and ascertain as to for what purpose and between that persons such a statutory fiction is to be resorted to. Thereafter, fill effect has to be given to such statutory fiction and it has to be carried to its logical conclusion. In the well known case of East End Dwellings Co. Ltd. Vs. Finsbury Borough Council, (1952) AC 109 (B), Lord Asquith while dealing with the provisions of the Town and Country Planning Act, 1947,observed:

"if you are bidden to treat an imaginary State of affairs as real, you must surely, unless prohibited form doing so, also imagine

as real the consequences and incidents which, if the putative, State of affairs had in fact existed, must inevitable have flowed from or accompanied it…….The statue says that you must imagine a certain State of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that State of Affairs."

That statement of law in respect of statutory fiction is being consistently followed by this Court Reference in this connection may be made to the case of State of Bombay Vs. Pandurang Vinayak and others, AIR 1953 Sc 244;1953 SCR 773 . From the facts of that case it shall appear that Bombay Building (Control on Erection) Ordinance, 1948 which was applicable to certain areas mentioned in the schedule to it, was extended by a notification to all the areas in the province in respect of buildings intended to be used for the purposes of cinemas. The Ordinance was repealed and replaced by an Act which again extended to areas mentioned in the schedule with power under sub-section (3) of Section 1 to extend its operation to other areas. This court held that the deemed clause in Section 15 of the Act read with Section 25 of the Bombay General Clauses Act has to be given full effect and the expression 'enactment' in the act will cover the word'Ordinacne' occurring in the notification which had been issued, In that connection it was said:-

" The corollary, thus, of declaring the provisions of Sec. 25, Bombay General Clauses Act, applicable to the repeal of the ordinance and of deeming that ordinance an enactment is that, whatever, the word " ordinance " occurs in the notification, that word has to be read as an enactment."

The word " deeming" came up for interpretation in the case of Chief Inspector of Mines and another etc. Vs. Karam Chand Thapar Etc. AIR 1961 SC 838: 1962 (1) SCR 9, it was said:-

" Were these regulations in force on the alleged date of contravention? Certainly, they were, in consequence of the provisions of Section 24 of the General Clauses Act. The fact that these regulations were deemed to be regulations made under the 1952 Act does not in any way affect the position that they were law in force on the alleged dated of contravention. The argument that they were "regulations" under the 1952 Act in consequence of a deeming provision, they were not laws in force on the alleged date of contravention is entirely misconceived."

Te word "deeming" has also been interpreted in the case of M/S J.K. Cotton Spinning and Weaving Mills Ltd. And another Vs. Union of India and others, AIR 1988 SC 191: 1988(1) SCR 700, it was said:-

The Apex Court in the case of Madan Mohan Vs. Madan Kumar ARC 1993 SC and Full Bench Rent Cases 133 has held that the Rent control laws have tried to balance the equity and once the ground of eviction is made out no discretion is left with the authority to refuse, the release of eviction sort for. The observations are quoted below:-

" In such case it will be advisable If the Controller while passing the order of eviction on the ground specified in Clause (i) of

sub-section (2) of Section 14 of the Act specified the " amount due" till the date of the order and not merely leave it to the parties to contest it after passing of the order of eviction as to what was the amount dues."

"Surely, the Rent Control Acts, no doubt, are measures to protect tenants from eviction except on certain specified grounds if found established. Once the grounds are made out and subject to any further condition which may be provided in the Act, the tenants would suffer ejectmnet. Again the protection given in the Acts is not to give licence for continuous litigation and bad blood."

"Whatever, protection Rent Acts give they do not give blanket protection for " non-payment of rent" . This basis minimum has to be complied with by the tenants. Rent, Acts, do not contemplate that if one takes a house on rent, he can continuous to enjoy the same without payment of rent."

Interference Under Article 226 of the Constitution of India.

As held in Surya Dev Rai Vs. Ram Chandra 2003 SC and Full Bench Rent Cases 512, that a writ of certiorari in Article 226 of the Constitution of India is issued, where the sub-ordinate court has acted in flagrant disregard of law and procedure and thereby resulting in the failure of justice and further the error is manifest and apparent on the face of the record based on clear ignorance of law. The observation is quoted below:-

" Authority in abundance is available for the proposition that an error apparent on face of record can be corrected by certiorari. The broad working rule for determining what is a patent error or an

error apparent on the face Ors. V. Mallikarjun Bhavanappa Tirumale, (19600 1 SCR 890. It was held established by lengthy and complicated arguments or an error in along drawn process of reasoning on points where there may conceivably be tow opinions quash the proceedings of the tribunal, authority or Court but may not substitute its own findings or directions in lieu one given in the proceedings forming the subject matter of certiorari."

The two courts below have traveled against the of law laid down by the Apex Court in the case of H.C. Pandey (Supra) which has been followed throughout. The heirs of the family members shall form a single tenancy, therefore after the houses have no right to get the benefit of Section 20 (4) of the Act by virtue of the proviso to Section 20(4) of the Act.

A writ of certiorari is quashing the order dated 27-11-2002 passed by the courts below.

However, time is granted to vacate the premises by 31st of December 2004 provided undertaking is given by the petitioners by 15th of Oct. 2004 before the J.S.C.C and the entire dues are paid by that date. In case of default the execution of decree shall proceed forthwith.

Writ petition is allowed. No order as to cost.

Dated: 23-9-2004 **(RAJESH TANDON J)**

M.K.